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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-879

HEUBLEIN, INC.,

Appellant,

v.

SOUTH CAROLINA TAX COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR THE APPELLANT

Opinions Below

The opinion of the Supreme Court of South Carolina is reported at 254 S.C. 17, 183 S.E. 2d 710. It is set out at p. 35 of the Appendix. The unreported Order of the Court of Common Pleas has been set out at p. 28 of the Appendix.

Jurisdiction

The decision of the Supreme Court of South Carolina was filed September 22, 1971. On October 11, 1971, a petition for rehearing was denied and on January 7, 1972, Appellant filed its Jurisdictional Statement in this Court.

Probable jurisdiction was noted on February 28, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1257(2).

Questions Presented

The Supreme Court of South Carolina held that Public Law 86-272 did not protect Heublein from South Carolina corporate income taxes because in compliance with South Carolina's Alcoholic Beverage Control laws Heublein, as an out-of-state producer, made its interstate shipments of alcoholic beverages to an unrelated South Carolina wholesaler through Heublein's local South Carolina representative instead of directly to such wholesaler. The questions thus presented are:

(1) Did the Supreme Court of South Carolina err in holding that the transfer of Heublein's alcoholic beverage products through its local representative in South Carolina pursuant to requirements of State liquor laws caused Heublein's interstate shipments to lose the protection of the Interstate Income Tax Act, Public Law 86-272?

(2) If so, may South Carolina properly avoid the application of Public Law 86-272 to income from interstate commerce by basing its jurisdiction to assess a South Carolina income tax against Heublein on activities of Heublein's South Carolina representative which South Carolina liquor laws require him to perform?

Statutes and Constitutional Provision Involved

Public Law 86-272, 15 U.S.C. 381, *et seq.*, provides in pertinent part that:

> "*Imposition of net income tax—Minimum standards*
>
> (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the

income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)."

The full text of Public Law 86-272 appears in the Jurisdictional Statement, pp. A. 30-32. The South Carolina Alcoholic Beverage Control laws (hereinafter, ABC laws), and the South Carolina corporate income and license tax statutes appear at pp. A. 33-40, and A. 40-41 of the Jurisdictional Statement, respectively. Amendment XXI of the Constitution of the United States appears at pp. A. 29-30 of the Jurisdictional Statement.

Statement

Appellant, Heublein, Inc., a Connecticut corporation not qualified to do business in South Carolina [App. 8], engages in the manufacture and sale of alcoholic beverages. Heublein employs a representative in South Carolina who promotes the sale of its products by calling on retail accounts and by briefing salesmen employed by an unrelated wholesaler. [Order: App. 29-30]. The wholesaler sends

orders for Heublein products to Heublein in Hartford, Connecticut for acceptance or rejection. If accepted, these orders are filled by shipment from Hartford.

South Carolina in 1958 enacted its Alcoholic Beverage Control Act, the text of which appears in The Jurisdictional Statement, A. 32-40. The Supreme Court of South Carolina summarized the effect of this Act as requiring that:

> "... a producer of alcoholic beverages, before shipping liquor into South Carolina, must be registered with the State and that such producer appoint a 'producer-representative' who shall be a resident of the State. It is further provided that shipment of alcoholic liquors into the State must be made to the 'registered representative' of the producer who must accept delivery of the liquors within the geographical limits of South Carolina. Thereafter, the producer, through his representative, is authorized to make delivery of the alcoholic liquors from within South Carolina to a licensed wholesaler in the State. The 'producer-representative' then certifies as to such delivery to the appellant Tax Commission." [App. 36.]

In practice, Heublein shipped its products by common carrier to the wholesaler's warehouse in Columbia, South Carolina [App. 10] and mailed the bills of lading to the Heublein representative in South Carolina, who turned them over to the wholesaler pursuant to a Certificate of Transfer obtained from the Alcoholic Beverage Control Commission, sending the Commission a copy of the invoice. [Order: App. 30-31.] This practice fulfills the requirements of the ABC law. [App. 23, 37.]

The South Carolina Tax Commission assessed Heublein for state income and license* taxes for taxable years 1964 through 1968, inclusive, rejecting Heublein's claim that

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* Liability for license taxes depends upon liability for income taxes.

Public Law 86-272 prevented the imposition of these taxes. [Jurisdictional Statement, A. 28, 29.]

Heublein paid the taxes in February, 1969, and brought suit to recover them in the Court of Common Pleas.* That court, after trial, held that Heublein's activities in South Carolina "did not exceed the minimum activities permitted by Public Law 86-272" [Order: App. 33], and that even if they did, it was only as a result of state compulsion and therefore "Heublein would not be liable for South Carolina income taxes because the power of a state to tax may not be extended under the guise of the exercise of its police power." [Order: App. 34.]

The Supreme Court of South Carolina reversed, on the grounds that compliance with South Carolina's ABC laws sufficed to strip Heublein of the protection of Public Law 86-272.

SUMMARY OF ARGUMENT

Heublein, Inc. is a Connecticut Corporation engaged primarily in the manufacture and distribution of alcoholic beverages. During the years in question, Heublein maintained no office, warehouse or stock of goods within South Carolina.

The alcoholic beverage products of Heublein were distributed in South Carolina by an unrelated wholesaler. This wholesaler sent orders for Heublein products to Heublein at Hartford, Connecticut. Upon acceptance of an order, Heublein delivered its products to a common carrier in Hartford with instructions to the carrier to make delivery at the wholesaler's warehouse in South Carolina.

In compliance with South Carolina's Alcoholic Beverage Control laws (ABC laws,) Heublein maintained within

* The amount of the tax owing, should liability be found, is not in dispute.

South Carolina a resident producer-representative who was a consignee of Heublein shipments to the South Carolina wholesaler. In accordance with these ABC laws, the producer-representative endorsed the shipping documents and obtained the necessary official clearance in accomplishing the legal transfer of title in South Carolina of the Heublein products from Heublein to the unrelated wholesaler. The other functions of the Heublein producer-representative in South Carolina were to promote the sale of Heublein products by calling on retailers within the State and by briefing the salesmen employed by the wholesaler. The Heublein producer-representative had no authority to take or accept orders for Heublein products and did not take such orders.

It is the position of Heublein that Public Law 86-272, the Interstate Income Tax Act, prevents South Carolina from imposing an income tax on Heublein. Public Law 86-272 prohibits a State from imposing an income tax on income from interstate commerce if the only business activities within the State by the taxpayer are the solicitation of orders for sales of tangible personal property which orders are sent outside the State for approval or rejection and, if approved, are filled by shipment of delivery from a point outside the State.

Heublein's business activities within the State of South Carolina did not exceed the business activities specified in Public Law 86-272 and, therefore, Heublein was exempt by Federal statute from the imposition of a South Carolina income tax. This conclusion is mandated by the plain meaning of the Federal statute.

The required retention by Heublein of legal title to its alcoholic beverage products until such products were physically within South Carolina and its transfer of such title

to the wholesaler in South Carolina were not business activities within South Carolina which would cause Heublein to lose the protection of Public Law 86-272. The legislative history of Public Law 86-272 demonstrates that the Congressional intent was to establish a uniform national standard for the imposition of local income taxes on multistate businesses and that such standard was concerned with the economic substance of interstate sales and shipments and not with the technical legalities of transfer of title or situs of sale. Thus, the Supreme Court of South Carolina has erred in holding that the transfer of technical legal title within the State of South Carolina in compliance with the State's ABC laws negated the application of Public Law 86-272 to Heublein's sales and shipments in interstate commerce. This position of the Supreme Court of South Carolina disregards the facts of the instant case as determined by the Trial Court, and is based upon a place-of-sale test which has been rejected by Congress and by the highest courts of other States.

It is further Heublein's position that South Carolina may not properly avoid the application of Public Law 86-272 by requiring Heublein to complete the transfer of title to interstate shipments within the State under its ABC laws and then using these required activities as the basis for its jurisdiction to impose an income tax on Heublein. If South Carolina is permited to avoid the application of Public Law 86-272 by this bootstrap approach, the effectiveness of the Federal statute will be substantially nullified not only as to alcoholic beverage products but as to all products sold in interstate commerce.

The consequences of either allowing the States to determine the applicability of Public Law 86-272 by reference to their local law of sales, or by reference to activities re-

quired by the States themselves, are disastrous to the policies embodied in the Federal Statute as applied to all segments of interstate commerce. In either case, the Statute will cease to shape State taxing policy, but will instead conform to whatever tax result each State chooses to achieve. Not only will this emasculate Public Law 86-272, but if condoned here, these methods of statutory construction undercut any attempt by Congress, now or in the future, to regulate State income taxation of interstate commerce.

South Carolina's attempt to use the Twenty-first Amendment to justify its imposition of income tax on Heublein must fail simply because the Twenty-first Amendment does not further the interest of any State in income tax revenues. No South Carolina regulatory law has been questioned: The question is whether South Carolina may impose its general corporate income tax on Heublein. The South Carolina corporate income tax is not a regulatory measure. Public Law 86-272 is a regulatory measure, but it regulates State income taxes, not alcoholic beverages. The conflict presented in this case is between South Carolina's corporate income tax statute and Congressional legislation regulating State income tax statutes: the Twenty-first Amendment is not relevant to the solution of this conflict. Moreover, even if Public Law 86-272 regulated alcoholic beverages, it is clear that the Twenty-first Amendment has not deprived Congress of all power over alcoholic beverages. The Twenty-first Amendment does not render Public Law 86-272 inapplicable to the alcoholic beverage industry.

ARGUMENT

I.

Heublein's Activities in South Carolina Do Not Remove it From the Protection of Public Law 86-272.

The essentially undisputed facts in this case establish that, for the years in question, Heublein conducted its business in South Carolina through a representative who traveled the State promoting Heublein products, and through an unrelated wholesaler which purchased the Heublein products for resale to its customers. All orders for Heublein products were made by the wholesaler to Heublein in Hartford, Connecticut, where they were accepted or rejected.

Upon acceptance of an order, Heublein delivered its products to a common carrier in Hartford with instructions to the carrier to make delivery at the wholesaler's warehouse in South Carolina and with the bill of lading made out in the name of Heublein's representative in South Carolina and the wholesaler. The shipping papers were then mailed to Heublein's representative in South Carolina who obtained transfer clearance from the Alcoholic Beverage Control Commission and who then completed the transfer of the products to the wholesaler by delivery of the bill of lading. In many instances, the physical delivery of the products to the wholesealer's warehouse was completed prior to the transfer of the title papers.

The application of Public Law 86-272 to this simple factual pattern presents no apparent difficulty. The Statute provides that:

> "(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on

the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)."

Heublein fits within the plain language of the Statute: It solicits orders in South Carolina as permitted by subsection (1); it is undisputed that orders are sent to Heublein in Hartford for "approval or rejection"; and it would be hard to find a clearer instance than that portrayed by the facts in the present case of orders which are "filled by shipment or delivery from a point outside the State."

The legislative history reinforces this interpretation of the clear statutory language. If anything, the circumstances from which the Statute springs, and the Congressional purpose it embodies, argue even more imperatively that it apply in this case.

In February, 1959, this Court decided *Northwestern Cement Co.* v. *Minn.*, 358 U.S. 450, upholding State power to tax interstate business, provided only there was a sufficient nexus between the enterprise sought to be taxed and the taxing state.

Speaking for the majority, Mr. Justice Clark noted that the burgeoning of interstate commerce, and the absence of Congressional regulation of its taxation by the States, left this area of the law to develop through the courts (*Id.* at 457). As the opinion pointed out, the results were not entirely satisfactory; and Mr. Justice Frankfurter's dissent articulated some of the causes:

> "I am not unmindful of the extent to which federal taxes absorb the taxable resources of the Nation, while at the same time the fiscal demands of the States are on the increase. These conditions present far-reaching problems of accommodating federal-state fiscal policy. But a determination of who is to get how much out of the common fund can hardly be made wisely and smoothly through the adjudicatory process. In fact, relying on the courts to solve these problems only aggravates the difficulties and retards proper legislative solution.
>
> At best, this Court can only act negatively; it can determine whether a specific state tax is imposed in violation of the Commerce Clause. Such decisions must necessarily depend on the application of rough and ready legal concepts. We cannot make a detailed inquiry into the incidence of diverse economic burdens in order to determine the extent to which such burdens conflict with the necessities of national economic life. Neither can we devise appropriate standards for dividing up national revenue on the basis of more or less abstract principles of constitutional law, which cannot be responsive to the subleties of the interrelated economies of Nation and State.
>
> The problem calls for solution by devising a congressional policy. Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the States and the needed limits on such state taxing power. Congressional committees can make studies and give the claims of

the individual States adequate hearing before the ultimate legislative formulation of policy is made by the representatives of all the States. The solution to these problems ought not to rest on the self-serving determination of the States of what they are entitled to out of the Nation's resources. Congress alone can formulate policies founded upon economic realities, perhaps to be applied to the myriad situation involved by a properly constituted and duly informed administrative agency." *Id.* at 475-477.

The view that Congress ought to act in the area of State taxation was far from new. Justice Frankfurter himself had expressed it before*, as had other members of this Court.**

Congress quickly reacted to the *Northwestern Cement* decision and the subsequent refusal of this Court to hear *Brown Forman Distillers Corp.* v. *Collector of Revenue*, 234 La. 651, 101 So. 2d 70 (1958), *appeal dismissed* 359 U. S. 28 (1959), and accepted the invitation to apply itself to the subject. Congress was aware of the problems that the multiplicity of taxing jurisdictions had produced: problems of apportionment and of determining taxable income according to rules which varied from state to state which, in turn, lead to the possibility of multiple taxation of the same income, or no taxation at all; and, above all, to the staggering complexity of the law which made compliance difficult

* *McCarrol* v. *Dixie Greyhound Lines, Inc.*, 309 U. S. 176, 188-89 (1940) (dissenting opinion); *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 300 (1944).

** *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 327 (1938) (Black, dissenting opinion); *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 448-55 (1939) (Black, dissenting opinion); *McCarrol* v. *Dixie Greyhound Lines, Inc.*, 309 U. S. 176, 188-89 (1940) (Black, Douglas, Frankfurter, dissenting opinion); *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S. 292, 306-07 (1944) (Jackson, concurring opinion); *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340, 360 (1944) (Rutledge, concurring opinion).

and costly. [S. Rep. No. 658, 86th Cong. 1st Sess. 2-4 (1959)]. As the Committee reports make clear, not only was Congress mindful of the chaotic conditions then prevailing in the state taxation area, it was also concerned over the apparently broad sanction the *Northwestern* decision gave to the state taxing efforts. Realizing the complexity of the area, a complexity augmented by the presence of conflicting interests among those whose cooperation was required to come to grips with the problem, Congress sought to stabilize state taxation so that it might take the time necessary to evolve a comprehensive solution. [H.R. Rep. No. 936, 86th Cong. 1st Sess. 2, 3 (1959); S. Rep. No. 453, 86th Cong. 1st Sess. 12 (1959); S. Rep. No. 658, 86th Cong. 1st Sess. 5 (1959)].

Congress chose to effect this stabilization by limiting state taxing power. Senate Report 453 recommended this approach [S. Rep. No. 453, 86th Cong. 1st Sess. p. 12 (1959)] and the statute enacted embodied it.

Congressional intent to establish a uniform standard that would protect multistate business in each state clearly emerges from the proposals and recommendations. An early proposal would have prohibited state taxation of multistate enterprises which did not maintain a place of business within the taxing state [S. Rep. No. 453, *supra* 14; S. J. Res. 113]. The scope of the protection ultimately decided upon is spelled out in the Senate Finance Committee Report accompanying the final bill:

> ". . . if the only business presence within the State by a person engaged in interstate commerce is the solicitation by his salesmen of orders for sales of tangible personal property and the orders are sent to an office out of the State for approval or rejection, and if the order is approved, it is filled by shipment or delivery from a stock of goods, warehouse, plant, or factory located out of the State, the net income

> tax of the State or political subdivision thereof on income derived within the State by such person from interstate commerce may not be imposed.
>
> The immunity provided by subsection (a) of section 1 of the bill will not be available to a person, however, if the business activities by salesmen within the State on behalf of such person are not limited during the taxable year to the solicitation of such orders or of orders described in paragraph (2) of subsection (a), or both. The provisions of subsection (a) of section 1 of the bill will not be available to grant immunity to a person where the orders are filled by a shipment or delivery from a stock of goods, warehouse, plant, or factory maintained by the person within the State." S. Rep. No. 658, 86th Cong. 1st Sess. 6, 7, (1959).

Heublein is clearly within the Statute

This remedial legislation clearly applies to this case. The trial court found that Heublein's solicitation activities within the state did not exceed those allowed by Public Law 86-272, a finding which the South Carolina Supreme Court left undisturbed. The orders are plainly sent to Hartford for approval or rejection, nor is there any doubt that Heublein ships from out-of-state: Heublein warehouses its stock in Connecticut and can only get its products to South Carolina by "shipment . . . from a point outside the State." The Committee Report shows that Congress meant to protect a businessman who shipped from a stock of goods maintained outside of the state, leaving unprotected those who maintained their stocks in the state. The business location test of the earlier proposal is thus, to this extent, intentionally continued in Public Law 86-272. This is the criterion embodied in the Statute, and Heublein fits within it.

The Supreme Court of South Carolina misconstrued Public Law 86-272

The Supreme Court of South Carolina nonetheless decided that Public Law 86-272 did not apply to Heublein because Heublein, in shipping its goods into the state, had complied with South Carolina's Alcoholic Beverage Control Laws, [South Carolina Code of Laws (1962); Jurisdictional Statement, A. 32-40].

The pertinent section of this law, §4-141 South Carolina Code of Laws (1962 as amended) [Jurisdictional Statement, A. 39] provides that:

> ". . . alcoholic liquors [shipped from outside South Carolina] shall be shipped or moved only to the registered producer in care of the producer representative who is registered to handle the property of the registered producer originating the shipment . . . after delivery to the producer's representative is complete, [the alcoholic liquors] may then be shipped . . . to a duly licensed wholesaler."

In practice, the products were physically shipped to the wholesaler's warehouse and the shipping documents showed the Heublein representative as a consignee. This practice is acceptable under the South Carolina law, as was elicited at the trial of this case:

> "The Court: It's your interpretation then, of that law, that Heublein or any other manufacturer of similar products would be required to actually have in existence some type of warehouse or building in to which the shipment was unloaded and then be reloaded and taken to the distributor?
>
> "Mr. Argoe [representing the South Carolina Tax Commission]: Physically, it does not have to be handled that way . . . .
>
> "The Court: Well, let's assume as has been testified to that [Heublein's representative] has a desk at

> [the wholesaler's] office. Wouldn't it be practical for the shipper to come to [Heublein's representative] with the shipment at [the wholesaler's] office and hand him a document and say that the product that was ordered is outside in the truck and then for [Heublein's representative] to notify [the wholesaler] and it be unloaded into [the wholesaler's] warehouse?
>
> "Mr. Argoe: In practice that is accepted by law, but delivery must be made directly to the producer representative. In practice the liquor may be delivered, consigned to this particular destination or point, but by law, they are required to accept delivery. Heublein cannot ship from without the State liquor direct to the wholesaler within the State." [App. 23]

The ABC laws thus require that the producer retain technical legal title until the alcoholic beverages arrive in South Carolina. Only after the products have physically arrived in South Carolina may the producer complete the passage of title to the licensed wholesaler, even though the products may be in the wholesaler's warehouse at that time.

The South Carolina Tax Commission apparently took the position that the mandated passage of title within South Carolina results in an intrastate sale, and not a sale in interstate commerce. The Commission then argued that since the sales occur in South Carolina, "The Interstate Income Law, Public Law 86-272, applicable when delivery is made from a point outside the State, does not apply to grant immunity from South Carolina taxes." [Brief of South Carolina Tax Commission in the Supreme Court of South Carolina, pp. 8, 9.] Thus, the Commission's entire case rests on the proposition that the endorsement and transfer in South Carolina of title documents by Heublein's local representative to the licensed wholesaler in South Carolina, as required by the ABC laws, constitute intrastate

sales occurring in South Carolina and therefore beyond the scope of protection of Public Law 86-272.

It is apparent that the whole thrust of the Commission's argument is beside the point since Public Law 86-272 speaks in terms of filling orders for products by "shipment or delivery from a point outside the State." The plain language of the statute demonstrates that Public Law 86-272 is concerned with the physical location of goods when ordered and shipped in interstate commerce, and not with the technicalities of determining place of sale or passage of title. Further, the Senate Report speaks of "shipment or delivery *from* a stock of goods . . . located out of the State" [S.Rep. No. 658, 86th Cong. 1st Sess. 6 (1959) (emphasis added)], emphasizing that it is where the goods are from that counts. This is in keeping with the thrust of the statute, which is to focus on how sales are solicited, and where the goods are located when an order is filled.

Furthermore, commercial reality confirms that the sale which takes place between Heublein and the wholesaler occurs in Connecticut, rather than South Carolina. Heublein completes its part of the substantive requirements of the transaction in Connecticut when it puts the goods into the hands of the common carrier at Hartford, Connecticut and mails the invoice to the wholesaler. At this point, Heublein can be said to have performed the last substantive act required to transfer ownership. There is left only the purely documentary formality performed by Heublein's representative in South Carolina, when he signs the shipping documents over to the wholesaler and informs the Alcoholic Beverage Control Commission of the transfer. Even this was usually done "after the fact" [App. 19]. At most, Heublein retains bare legal title, for the purpose of ensuring compliance with South Carolina's regulatory laws. But this is hardly enough, as a matter of tax policy, to negate the application of Public Law 86-272 to what is

clearly an interstate transaction. For example, dealing with this situs of sale problem as it arises under the Internal Revenue Code of 1954, §861, Treasury Regulation section 1.861-7(c) provides that "a sale of personal property is consummated at the time when, and the place where, the rights, title and interest of the seller in the property are transferred to the buyer. Where bare legal title is retained by the seller, the sale shall be deemed to have occurred at the time and place of passage to the buyer of beneficial ownership and the risk of loss." [Treas. Reg. §1.861-7(c) (1957)]

In short, putting aside for the moment questions of technical delivery for the purposes of South Carolina ABC laws, delivery is made to the buyer when Heublein puts its product in the hands of the carrier, at Hartford. The question we come down to, then, is whether, in examining a pattern of commercial transactions in order to determine their tax consequences under tax laws of general application, the technical concepts of delivery which have grown up under South Carolina's ABC laws ought to be dispositive. It seems they should not, especially where these concepts are empty of substantial factual content, and lead to results in conflict with those determined under the bodies of law which traditionally govern the substance of the transactions in question.

The South Carolina Tax Commission contended that the South Carolina Supreme Court's holding that the sales here involved were "intrastate transactions and beyond the reach of Public Law 86-272 [App., 37] is a non-federal holding resting upon state law. [Motion, pp. 4, 5.] But whether the scope and applicability of the federal statute is determined by state law depends upon the intent of Congress, *Reconstruction Finance Corporation* v. *Beaver County,* 328 U. S. 204, 208 (1946).

The language and legislative history of Public Law 86-272 make it abundantly clear that Congress did not intend that the application of the statute turn on such questions of

local law. Congress made especially plain its dissatisfaction with any test dependent upon the local law of sales. Speaking of tax apportionment, a problem whose unsatisfactory resolution by the states provided substantial impetus to the enactment of Public Law 86-272, the Committee Report states:

> "The committee understands that the formulas currently in use are complex, that even within the formulas the meaning of the basic words are inexact; and that for example, many of the 35 income tax States used a different definition to cover the term 'sale'. It understands that a 'sale' may be considered to have taken place, according to these definitions, in any of these locations: In the place where the buyer and seller met; in the place where the goods were manufactured; in the place where the goods were stored; in the place where the transaction was finally approved; in the place where the selling company was domiciled; in the place where the salesman's office was located; or ***in the place to which the goods were shipped.*** This lack of uniformity creates the possibility that each of a number of different States may regard the same sale as having occurred in it, depending upon the particular definition of 'sale' under its own tax laws. If each of several different States treat the same sale as attributable to it because of its own definition of 'sale' in the State, it is apparent that income from the same sale may be attributed to each of the States under whose law the same sale is to attributed." S. Rep. No. 658, 86th Cong. 1st Sess. 3, 4 (1959). (Emphasis added.)

There could be no more decisive rejection of the point-of-sale test in the context of national tax policy. Reimporting it can only destroy the uniformity which Public Law 86-272 is designed to achieve.

Moreover, if local law determining the point of sale is allowed to govern the application of Public Law 86-272,

South Carolina could always, as it has done below, bootstrap itself out of the area governed by the Federal statute and apply its own tax laws. The result thus achieved, ironically enough, avoids application of the Federal statute by means of the rejected state law point-of-sale test the statute was designed to supplant.

Perhaps more remarkable than the South Carolina Supreme Court's recourse to the mandatory passage of bare legal title provisions in the ABC laws to determine the place of sale for purposes of not applying Public Law 86-272, is its failure to discuss the facts of the case before it. Public Law 86-272 has been before state courts of last resort on several occasions, and in each, a starting point in the analysis of its applicability is a consideration of the particular facts presented. See *State ex. rel. CIBA Pharmaceutical Products, Inc.* v. *State Tax Commission,* 382 S.W. 2d 645 (Mo. 1964); *Smith Kline & French Laboratories* v. *State Tax Commission,* 241 Or. 50, 403 P. 2d 375 (1965); *Herff Jones Company* v. *State Tax Commission,* 247 Or. 404, 430 P. 2d 998 (1967); *Clairol, Incorporated* v. *Kingsley,* 109 Su. 22, 262 A. 2d 213, *aff'd,* 57 N.J. 199, 270 A. 2d 702, *appeal dismissed* 91 S. Ct. (1971) No. 1367; *Hervey* v. *AMF Beaird, Inc.,* 464 S.W. 2d 557 (Ark. 1971).

As the Supreme Court of Oregon said in *Cal-Roof Wholesale, Inc.* v. *State Tax Commission,* 242 Or. 435, 410 P. 2d 233 (1966), speaking of its decision in *Smith Kline & French, supra:*

> "The particular facts of the *Smith Kline & French* case, not consideration of the label to be applied, made the prohibition of Public Law 86-272 there applicable." (at 239)

The Supreme Court of Oregon pointed out that the label there rejected, "intrastate", was of questionable relevance:

> "The application of Public Law 86-272 is not predicated upon judicial distinction between inter or intra-state activities. The constitutional power of Congress to regulate inter-state commerce carries with it the power to regulate state taxation of intra-state activities if such tax affects inter-state commerce." (at 239)

The South Carolina Supreme Court has nonetheless chosen to apply the label in this case, apparently feeling it dispositive even in the absence of factual analysis.

The trial court, on the other hand, extensively analyzed Heublein's activities in South Carolina. It found that Heublein had "no office, no warehouse, no telephone listing, no automobile, and no mailing address in South Carolina." [Order: App. 30.] After consideration of the stipulation of facts entered into by the parties and taking testimony, that court further found that "Heublein did not exceed the minimum activities permitted by Public Law 86-272, and therefore Heublein is not liable for South Carolina income or license taxes." [Order: App. 33.] The Supreme Court of South Carolina, by leaving these trial court findings undisturbed, by neglecting to discuss the facts at all, rested its entire position on its faulty analysis of Public Law 86-272. But this is an analysis which, if condoned, means that regardless of what the facts may be, because State law says that technical legal title must pass in South Carolina, interstate commerce becomes intrastate commerce and Public Law 86-272 does not apply.

The result reached is patently absurd. Not only does Heublein lose the protection Public Law 86-272 was meant to give, but by cutting its decision loose from any factual foundation, the South Carolina Supreme Court has ensured that every out-of-state seller of alcoholic beverages will similarly be denuded of this protection. Indeed, the alcoholic beverage industry need not face this hazard alone.

There is nothing to prevent any state from finding a sale occurring within its borders as a matter of state law in every constitutionally permissible instance, thus nullifying Public Law 86-272 *in toto* for all industries.*

As a consequence, Public Law 86-272 will conform to, rather than shape, the taxing policy of each state. This result, accomplished through judicial interpretation, will effectively abort this initial attempt by Congress to regulate this chaotic field, and hand the matter back to the courts, which will continue to be ill-equipped to handle it. (see pp. 11, 12, *supra*). This result is particularly unpalatable because it calls into question the ability, as a practical matter, of Congress ever to regulate effectively state taxation.**

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* As an example of what could be achieved under local law, California provides that "Sale includes . . . soliciting or receiving an order for [alcoholic] beverages". Deerings California Business and Professions Code Annotated, section 23025. This could effectively convert a solicitation protected in plain terms by Public Law 86-272 into a 'sale' occurring in California, with the consequence, were the reasoning of the South Carolina Supreme Court to be followed, that the Federal Statute did not apply.

** The passage of time has only reaffirmed the necessity for effective Federal regulation of State income taxation of interstate commerce. "The conclusion is inescapable that the voluntary adoption by the States of any kind of uniform sytem is a slow and halting process, if not a virtual impossibility. Efforts over many years have failed to achieve any marked degree of acceptance of uniformity of tax base or division-of-income rules. The result has been that highly regarded State tax administrators have themselves concluded that if uniformity is to be achieved, it can be done only by Federal action." H.R.Rep. 1480 88th Cong. 2d Sess. 133 (1964). The Report was equally clear as to the continued consequences of disuniformity:

> "This, then, is an assessment of the State income tax system and its effect on interstate commerce in the United States today. It is the picture of a system which works badly for both business and the States. It is the picture of a system in which the States are reaching farther and farther to impose smaller and smaller liabilities on more and more companies. It is the picture of a system which calls upon tax administrators to enforce the unenforceable, and the taxpayer to comply with the uncompliable." *Id.* at 598.

Once the principle is established that national legislation in this field is subject to the vagaries of local law, all future Congressional legislation on this topic risks the fate of Public Law 86-272.

II.

A. South Carolina's Regulatory Laws May Not Be Used To Frustrate Congressional Interstate Income Tax Policy.

The assumption, for the sake of argument, that Heublein's business activities in South Carolina were in excess of those activities which Public Law 86-272 protects, fails to justify the decision below. As that decision makes clear, the Supreme Court of South Carolina held that it was precisely because Heublein had complied with the ABC laws that Public Law 86-272 did not apply:

> "It is conceded that the sales here involved were made in accordance with the State statutory requirements. They were, therefore, intrastate transactions and beyond the reach of Public Law 86-272." [App. 37.]

The intriguing implication is that South Carolina may require an out-of-state company to engage in activities in excess of those which Public Law 86-272 protects, and thus subject the company to state taxation. The Court found no difficulty with the assertion by the South Carolina Tax Commission that "It is the legislative intent [of South Carolina] to require all importers of alcoholic liquors to pay income taxes to the State." [Brief of the South Carolina Tax Commission in the Supreme Court of South Carolina, p. 10.]

The consequences of this approach are indeed unfortunate for the Federal statute and the policy it serves, for this is

no less than an open invitation to South Carolina, or any state, to exercise its regulatory ingenuity to devise mandatory activities which state courts may interpret as beyond the protection of the Federal statute. The net effect will be to burden commerce with both the regulations called forth by this invitation and the income taxes Congress sought to prevent.

Application of this technique need not be limited to the alcoholic beverage industry, for while that industry is undoubtedly subject to state regulation, state police powers are wide ranging and encompass many, if not most, articles of commerce. The trial court perceived this problem and sought to avoid it by holding that while South Carolina could impose special requirements, that nonetheless, "compliance with such requirements cannot deprive Heublein of the effectiveness or applicability of the Federal law on this subject. Such State-imposed minimum requirements therefore come within the minimum activities protected by Public Law 86-272. To hold otherwise would set the various taxing authorities free to devise all manner of restrictive regulations so that they might avoid the effect of Public Law 86-272." [Order: App. 33.]

An analogous situation faced the Supreme Court of Oregon in *Smith Kline & French Laboratories* v. *State Tax Comm'n*, 241 Or. 50, 403 P. 2d 375 (1965). There, Smith Kline & French sent representatives into Oregon to "detail" physicians, hospitals and others in an effort to promote sales of its ethical drugs. Because of restrictions on the sales of prescription drugs to the general public, Smith Kline & French could not directly solicit the ultimate users of its products. In response to the Tax Commission's argument that Smith Kline & French consequently did not fall within the protective ambit of Public Law 86-272, the Court said:

> "the nature of plaintiff's business makes its activities in Oregon the equivalent of solicitation of orders in

other, less technical businesses. Ethical drugs are generally purchased by the public from retail druggists. The drug to be purchased is selected, not by the purchaser, but by his physician. An ethical drug sales effort comparable to direct solicitation of orders for shoes, valves, or cement requires 'selling' the physician on the wisdom of prescribing the particular product for his patient. By soliciting the stocking of plaintiff's products by druggists and the prescription of those drugs by physicians, plaintiff's detail men perform the same sales function in plaintiff's field that salesmen soliciting actual orders from the ultimate user perform in other businesses. A realistic legal and factual interpretation of P.L. 86-272 requires exemption of plaintiff from Oregon corporation income tax." (At 377, 378).

Similarly, the nature of Heublein's business as a distiller requires that it "deliver" in accordance with ABC regulations (here involving shipment from Connecticut with retention of bare legal title). But this technical delivery is the functional equivalent of that "shipment or delivery from a point outside the State" that the Federal Statute protects "in other, less technical businesses." To so hold is an eminently sensible solution to the problem of involuntary activities, and possesses the added virtue of providing to all interstate businesses the uniform protection of Public Law 86-272. The history and purpose of that Statute shows no intent to favor or disfavor any industry. The particular contours of state regulatory requirements are not relevant to the tax policy embodied in the Statute, especially where the regulation has effectuated no substantial change in the method of doing business.

Furthermore, this solution withdraws the incentive that any other solution gives to needless state regulation prompted by a desire for additional revenue.

The alternative is complete frustration of Congressional income tax policy. If each state legislature is left free to devise special requirements, whether they be registrations, appointment of agents, special modes of delivery—anything in fact which its own courts may interpret as beyond the protection of Public Law 86-272—the viability of the Statute is subjected to the whim of every state. The history of state taxation shows that States will quickly take advantage of the opportunities presented to them to augment their revenues.* And it is no answer to suppose that some or many of the States might refrain from exploiting the avenue to increased taxing jurisdiction thus opened up: Congress enacted Public Law 86-272 precisely because it was dissatisfied with leaving the choice to tax or not in the hands of each state.

B. The Twenty-first Amendment Does Not Sanction South Carolina's General Income Tax Levies.

The South Carolina Tax Commission may be expected to renew its argument in this Court that the imposition of South Carolina's general corporate income tax is authorized by the Twenty-first Amendment. This attempted justification is, however, wholly specious.

This is especially apparent from the form in which the argument has heretofore been presented.

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* Just as an example of how simple the technique can be, Florida requires, effective July 1, 1969, that all manufacturers or distributors of "spirituous liquors" qualify to do business in Florida before they ship spirituous liquors into the State. (F.S.A. §561.091). They are then automatically subjected to State tax on income, including income derived from interstate sales. (F.S.A. §220.03(1)(b); 1971 Laws ch. 71-984).

The South Carolina Tax Commission argued to the court below that "As Public Law 86-272 relates to the taxation of foreign corporations or businesses and is directly related to the Commerce Clause . . . it must yield to the State's power under the Twenty-first Amendment as does the Commerce Clause." [Brief of the South Carolina Tax Commission in the South Carolina Supreme Court, p. 7.]

This argument was essentially unchanged in the Motion to Dismiss filed in this Court [Motion to Dismiss, pp. 6-8].

The first flaw in the argument, surely fatal, is that the Twenty-first Amendment simply does not deal with state taxing power. The language and history of the Amendment may be sifted in vain for evidence that it was intended to preserve or extend the power of states to levy and collect income taxes. In addition to the repeal of the Eighteenth Amendment providing for national prohibition, the only substantive provision of the Twenty-first Amendment is contained in the second clause which reads as follows:

> "Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The Amendment unquestionably confers upon the States power to regulate alcoholic beverages. It is equally unquestionable that South Carolina seeks, in this litigation, to vindicate only its interest in revenue. This case arises and turns upon a revenue assessment under South Carolina's general corporate income tax statute. The applicability and validity of South Carolina's regulatory legislation has not been drawn into question. No piece or pattern of regulation will be validated or invalidated by the outcome of this lawsuit. The conflict lies between state and national income tax policy, and to this conflict the Twenty-first Amendment is not germane.

The Supreme Court of Oklahoma faced a remarkably similar situation in *Oklahoma Tax Commission* v. *Brown Forman Distillers Corp.,* 420 P. 2d 894 (Okla. 1966). The distillers there involved conducted their business in Oklahoma very much as Heublein conducts its business in South Carolina. They were required by the Oklahoma Alcoholic Control Act [37 O.S. 1961 §501 *et seq.*] to "domesticate" in Oklahoma and appoint a service agent. The question presented was whether those distillers were protected by Public Law 86-272. The Supreme Court of Oklahoma held that they were. To the contention of the Oklahoma Tax Commission that the Twenty-first Amendment required a different result because alcoholic beverages were involved, the Court said:

> "The [Tax Commission's] reliance on the 21st Amendment is misplaced. No alcoholic beverage regulation is involved here. The general income tax assessments in question are not within the compass of the 21st Amendment." (*Id.* at 898)

Moreover, even if it could be maintained that the conflict involved regulation rather than taxation, the South Carolina Tax Commission's confidence that the Twenty-first Amendment overbears the Commerce Clause is misplaced. Its argument on this point, that "Public Law 86-272 relates directly to the commerce clause and therefore must yield to the state's power under the Twenty-first Amendment" [Motion to Dismiss, p. 8] is quite clear, and quite clearly wrong.

This Court has repeatedly rejected the general proposition that the Twenty-first Amendment has deprived Congress of all power to regulate traffic in alcoholic beverages. *Dept. of Rev.* v. *James B. Beam Distilling Co.,* 377 U.S. 341 (1964) (upholding Congressional power under the Export-Import Clause); *Jameson & Co.* v. *Morganthau,* 307 U.S. 171, 173 (1939). This Court has unequivocally rejected

the specific proposition that the Twenty-first Amendment has deprived Congress of power over alcoholic beverages under the Commerce Clause:

> "To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce clause had been *pro tanto* 'repealed', then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331 (1964).

The view that the Twenty-first Amendment left Congress with no power over alcoholic beverages is admittedly difficult to maintain even under the best of circumstances, for as was said in *Jatros* v. *Bowles*, 143 F. 2d 453 (6th Cir. 1944) (upholding power of Congress to set maximum retail liquor prices):

> "Followed to its logical conclusion [the proposition that the Twenty-first Amendment had stripped the national government of all control over interstate commerce in alcoholic beverages], if valid, would mean that the federal government no longer has power to punish theft of intoxicants from interstate shipments of alcoholic beverages under the authority of the so-called Car Seal Act, nor to regulate or prohibit unfair trade practices in respect to such commodities through the Federal Trade Commission, nor to regulate tariffs through orders of the Interstate Commerce Commission, nor to prohibit unfair labor practices affecting commerce in intoxicants by brewers or distillers under authority of the National Labor Relations Act, 29 U.S.C.A. §151 et seq., nor to prescribe minimum wages or maximum hours for employees in such enterprises under au-

thority of the Fair Labor Standards Act, 29 U.S.C.A. §201 et seq." (at 455).

The cases cited by the Tax Commission in support of its contentions are easily distinguished. *Ziffrin, Inc.* v. *Reeves*, 308 U.S. 132 (1939) involved direct regulation of those engaged in transporting alcoholic liquors through the state. The case has nothing to do with income taxation, and its sweeping dictum concerning the scope of the Twenty-first Amendment can hardly be said to have survived *Hostetter* intact.

We do not have a situation here of a fixed licensing fee imposed in pursuit of a regulatory scheme such as the fee exacted in *Phillips* v. *City of Mobile,* 208 U.S. 472 (1908), and *State Board of Equalization* v. *Young's Market,* 299 U.S. 59 (1936), cited by Appellee. [Motion to Dismiss, p. 7]. The rationale advanced by the Court in *Phillips,* that "the higher the license . . . the better the regulation," (since it would tend to keep out undesirables and limit the number of those engaging in the business) (*Id.* at 479) has no application to a net income tax.

Cases such as *Mahoney* v. *Joseph Triner Corp.,* 304 U.S. 401 (1938); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n,* 305 U.S. 391 (1939); *Joseph S. Finch & Co.* v. *McKittrick,* 305 U.S. 395 (1939) involved direct regulation in the form of licensing importers or the prohibition of certain types of imports, or both.

But the validity of the South Carolina ABC Laws, which do regulate alcoholic beverage importation through registration and other requirements, are not here in issue. The question is whether a general corporate income tax such as South Carolina's, applicable to all industries, is a form of alcoholic beverage regulation which the Twenty-first Amendment specifically authorizes, to the extent that Congress is prohibited from applying its national income tax

policy to the alcoholic beverage industry. The argument which could reach this conclusion would also sweep aside all other Congressional regulations of interstate commerce as applied to alcoholic beverages, a *reductio ad absurdum* rejected in *Jatros* v. *Bowles, supra,* and by this Court in *Hostetter.*

Furthermore, the legislative history of the Amendment lends no support to this position.

The House and Senate debates which preceded Congressional submission of the Amendment demonstrate that Congress intended the second clause of the Amendment to protect the dry states through a retention of Federal power. As was said in an article read into the record by Senator Bingham, the clause was but a "restatement of the Webb-Kenyon law, already on the law books, which would write into the constitution the right of the dry states to have Federal protection against the importation of liquor".*

While the Amendment gave to dry states the additional protection of Federal power to enforce their prohibitory legislation, it did not otherwise prevent interstate commerce in liquor. In the words of Senator Glass:

> "In my own interpretation of the resolution as I have presented it, there can be no consignee of intoxicating liquors in a dry State. Liquors may be shipped across a State in interstate commerce from one wet State to another wet State, but the resolution as I have drafted it prohibits the shipment of intoxicating liquors into a State whose laws prohibit the manufacture, sale, or transportation of liquors. So I have met the objection that we are undertaking to interfere with interstate commerce as between States which authorize the manufacture, transportation, and sale of liquors. . ."**

* 76 Cong. Rec. 4228 (1933). This was a widely held view. See remarks of Senator Blaine, *id.* at 4140-41; Senator Borah, *id.* at 4170-72; Mr. Gibson, *id.* at 4526.

** Remarks of Senator Glass, 76 Cong. Rec. 4219 (1933).

Nowhere does it appear that Congress intended to immunize alcoholic beverages from the effect of any and all national legislation.

CONCLUSION

The application of Public Law 86-272 to the income from Heublein's interstate shipments of alcoholic beverages in this case is clear and unequivocal. South Carolina may not avoid the Federal Statute by tests rejected by the Congress or by mandated local activities. Nor may the State use the Twenty-first Amendment to justify same. For these reasons, the decision below should be reversed.

Respectfully submitted,

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